Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	**ORIGINAL**
Petition of **Supra Telecommunications & Information Systems, Inc. ("Supra")** Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Florida Public Service Commission ("FPSC") Regarding the FPSC's failure to act on Supra's request for mediation pursuant to Section 252(a)(2) or subsequent arbitration pursuant to Section 252(b)(1) on unresolved issues clearly and specifically set forth in the parties' petition and response.	)	**WC** Docket No 02-238

REPLY COMMENTS TO PETITION OF SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC. ("Supra") PURSUANT TO SECTION 252(e)(5) OF THE COMMUNICATIONS ACT

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC. ("**SUPRA**") by their undersigned counsel, hereby files these Reply Comments to Comments filed by both the Florida Public Service Commission ("FPSC") and BellSouth

The comments filed by both the FPSC and BellSouth gloss over the specific authority identified in Supra's initial Petition, supporting preemption, and instead engage in an incomplete recitation of irrelevant and immaterial allegations. The threshold, and only issue for the FCC is whether the FPSC "failed to act." If the FCC so finds that the FPSC failed to act, then preemption is warranted.

Specifically, under § 252(e)(5), the FCC acts in the place of a state commission, if the state commission fails to resolve "all issues clearly and specifically presented to it." *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 838 (D.C. Cir. 2002) Section 252(b)(4)(C) specifically states that: "The State commission **shall** resolve

each issue set forth in the petition and response . . ." (Emphasis added). The nine (9) issues Supra seeks the FPSC to assume jurisdiction over were "clearly and specifically" set forth in Supra's initial response to BellSouth's petition for arbitration in accordance with 47 U.S.C. § 252(b)(4). *See* Exhibit D attached to Supra's Initial Petition for Preemption. Accordingly, Supra's unresolved issues were clearly and specifically presented to the FPSC.

Under § 252(e)(5) the phrase "failed to act" encompasses two distinct concepts: (1) incomplete action, and (2) no action. *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 837 (D.C. Cir. 2002). With respect to the concept of "incomplete action" the court's have defined this to encompass when a state commission "neglect[s] to do something," "leave[s] something undone," and "be found wanting in not doing something." *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 837 (D.C. Cir. 2002). When these above definitions are coupled with the mandate that a state commission "**shall**" resolve "**all**" issues set forth in the parties' petition and response, it well within the bounds of reason to conclude that if "all" of the issues presented in the petition and response are not afforded the same procedural due process safeguards that all the other issues included in the petition and response, then the state commission is guilty of "leaving something undone" and "being found wanting in not doing something." In short, the state utilities commission is guilty of "incomplete action."

In this case, once Supra learned of BellSouth's refusal to honor its agreement on several issues, Supra requested that the FPSC order BellSouth to negotiate the final

language in good-faith[1] or in the alternative that the FPSC order mediation to resolve the dispute on the unresolved issues. The FPSC denied this specific request. Neither the FPSC nor BellSouth dispute these facts. This Petition is focused on the FPSC's refusal to grant a request for mediation on specific issues, rather than a dispute regarding the quality of an FPSC decision on a specific issue. *See Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 838 (D.C.Cir. 2002).

47 C.F.R. 51.801(b) provides in part that the FCC can act in the place of a state commission, if the state commission fails to grant a request "for mediation or arbitration." *See* 47 C.F.R. 51.801(b). *See* also Wisconsin *Bell, Inc. v. Public Service Commission of Wisconsin, et al*, 27 F.Supp.2d 1149, 1153 (W.D. Wisc. 1998) (where the court stated that a state commission fails to act when it "fails to respond to a request for mediation or arbitration"); *See* also MCI *Telecommunications Corporation v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 501 (3rd Cir. 2001) (where the court stated that a state commission fails to act when it "fails to respond within a reasonable amount of time to a request for mediation or arbitration.").

In this particular matter, Supra clearly and specifically set forth each unresolved issue in its initial response at the inception of this arbitration. The nine (9) specific unresolved issues set forth in ¶ 35 - of Supra's Petition for Preemption – were included in Supra's July 22, 2002 Motion ("July 22nd Motion"). Moreover, it is in this July 22nd Motion that Supra requested that the FPSC grant mediation consistent with 47 C.F.R. § 51.801(b). *See* Exhibit E, pg. 3 attached to Supra's Petition for Preemption (where Supra writes: this Commission [FPSC] should order BellSouth to return back to the negotiating

[1] Under 47 U.S.C. § 252(b)(5), the refusal of any party to continue negotiations after the State Utilities Commission has started to resolve the disputed issues, shall be considered to be a failure to negotiate in good faith as required by 47 U.S.C. § 251(c)(1).

table in order to resolve as many disputes as possible . . . Supra would also welcome Commission assisted mediation of this matter. In the event this Commission even considers granting any of the relief in [BellSouth's] Emergency Motion, Supra asks that this Commission first conduct an evidentiary hearing of the factual matters asserted by the parties.")

As described in Supra's Petition for Preemption, Supra agreed with BellSouth not to submit certain specific issues – properly set forth in the parties' petition and response – to an evidentiary hearing before the FPSC. *See* ¶ 26 Petition for Preemption. Subsequent to the evidentiary hearing, however, BellSouth refused to honor the parties' prior agreements regarding these issues.

As noted in our Petition for Preemption, BellSouth's refusal to include language into the final new agreement consistent with the parries' "agreed upon" issues is similar to the circumstances that arose In the Matter of Petition of WorldCom, Inc., et al Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., Docket Nos. 00-218, 00-249, 00-251, Memorandum Opinion and Order (adopted July 17, 2002).

In this referenced case, the ILEC made certain concessions and compromises on several issues prior the evidentiary hearing. Some of these agreements were not incorporated into the proposed contract. With respect to these circumstances, the FCC wrote "*In those instances* where one party clearly indicated that it supported or no longer opposed the other party's conceptual proposal or contract language or indicated that it was willing to modify its own proposal to reflect the other party's concerns, we

determine that it is appropriate to direct the parties to submit language conforming to such statements." *Id.* at para. 32.

In the present matter, BellSouth. likewise, indicated that it did not oppose Supra's conceptual proposals or proposed language. But for this understanding Supra would not have agreed to withdraw its issues properly set forth in its response filed with the FPSC.

It is ironic that even with the above referenced finding by the FCC regarding ILEC conduct *prior* to an evidentiary hearing, the FPSC argues in its comments that the ILEC should be *rewarded* with whatever language the ILEC chooses. See FPSC Comments pg.9.

FPSC denies request for mediation

On August 9. 2002, the FPSC issued Order No. PSC-02-1096-FOF-TP. *See* ¶ 74 of Supra's Petition for Preemption and Exhibit H attached thereto. In this Order the FPSC expressly refused to grant Supra's request for mediation.

With respect to the "agreed upon" issues that Supra requested mediation on, the FPSC wrote: "Supra **has had ample opportunity** to become familiar with BellSouth's agreement template, and ascertain what parts *of* the agreement would require modification, both to comply with the parties **"agreed upon"** and unarbitrated Issues, as well as those decided by the Commission." (Emphasis added). *See* pg. 14-15 of FPSC Order

The problem with the FPSC response is that it fails to address *the* specific issue raised in Supra's July 22, 2002 Motion: an order directing the parties to continue *to* negotiate in good-faith or in the alternative order mediation *for* the previously agreed upon unresolved issues. But for the agreement, Supra would not have withdrawn the

issues prior to the hearing. The FPSC's order, unfortunately, does not reflect the real life experiences of a CLEC operating in the shadow of a multi-billion dollar behemoth, such BellSouth, straddling nine (9) states with investments in Central and South America. In the absence of an order forcing BellSouth to negotiate in good faith, *or* in the alternative forcing BellSouth to mediation and if necessary subsequent arbitration on the agreed upon" issues - **no amount of time** afforded Supra would ever convince BellSouth to agree to language BellSouth did not want to agree to. This reality substantiates the FCC's own findings that ILECs, like BellSouth, posses superior bargaining power and have little incentive to agree to terms that will strip BellSouth of further customers. ¶ 15 First Report and Order. Supra simply seeks an even playing field.

As noted earlier herein, the FPSC's position is basically' that because BellSouth was smart" enough to deceive Supra into agreeing not to have an issue - properly set forth in the parties' petition and response - submitted to an evidentiary hearing. that Supra must now accept whatever language BellSouth so dictates. The FPSC's position is in direct conflict with the FCC own findings In the Matter of Petition of WorldCom, Inc., et al Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., Docket Nos. 00-218, 00-249, 00-251, Memorandum Opinion and Order (adopted July 17, 2002). Accordingly, Supra need not accept the language dictated by BellSouth.

Supra is not asking the FCC to review the underlying reasoning of a decision regarding the merits of an issue In this case. the FPSC has made no decision on the

See FPSC Comments pg 9.

merits on the nine (9) unresolved issues. The FPSC has, however, specifically denied mediation on these specific issues. The FPSC has not even made any "purported" effort to resolve the unresolved issues properly set forth in the petition and response. *See Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 837 (D.C. Cir. 2002) (where the court states that the FCC has effectively construed 252(e)(5) as not covering situations in which the state commission at least purports to resolve all the issues presented to it). In this instance there was no pretense by the FPSC to purport to resolve the merits of the unresolved issues. The FPSC simply denied Supra's request for mediation outright. In all respects, preemption is a viable option.

The FPSC's only comments on Supra's explicit request for assistance under the 1996 Telecommunications Act ("Act") involved a short statement that Supra "has had ample opportunity" to have negotiated any disputes regarding the parties' previously "agreed upon" issues. Given this explicit statement, it is evident that the FPSC was and is unwilling to act and to comply with its duty of resolving "all" issues clearly and specifically set forth in the parties' petition and response. See *Global Naps, Inc. v. Federal Communications Commission*, at 833 (where the court states: "The FCC's interpretation thus suggests that only if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request, does preemption become a viable option.") (Underline added for emphasis) In this case, the FPSC's refusal to resolve the particular matter raised in Supra's July 22nd Motion. has made preemption a viable option.

In sum, the FCC has found that an ILEC, like BellSouth, possesses superior bargaining power and has little incentive to agree to terms that will strip BellSouth of

further customers. ¶ 15 First Report and Order. The Act was designed to allow CLECs, like Supra, the opportunity to present its issues to a State commission, if a dispute in language exists or if the ILEC fails "to continue to negotiate in good faith."[1] In this instance, BellSouth has refused to continue to negotiate at all. Supra has reasonably relied on BellSouth's assurances in agreeing to withdraw issues properly placed before the FPSC at the inception of the arbitration. Supra formally requested that the FPSC order BellSouth to negotiate in good faith, defer mediation and if necessary hold a further evidentiary hearing on all outstanding and unresolved issues. The FPSC denied this request. All of the elements exist for preemption by the FCC.

No Dispute

There is no dispute from either the FPSC or BellSouth regarding the procedural circumstances as described above or as outlined in Supra's Preemption Petition. There is no dispute that both BellSouth and Supra waived, in writing, the statutory nine (9) month time frame for the FPSC to complete action on the arbitration petition filed on September 1, 2000. Furthermore, neither the FPSC nor BellSouth deny that no evidence was taken on the nine (9) unresolved issues. Neither the FPSC nor BellSouth dispute or deny that Supra made a specific request for mediation on the unresolved issues properly set forth in the parties' petition and response. Neither the FPSC nor BellSouth dispute or deny that the FPSC issued an order denying this request.

While this is a case of first impression, the 1996 Federal Telecommunications Act ("Act"), the rules and orders of the FCC, as well as the above cited case law do provide

[1] Under 47 U.S.C. § 252(b)(5), the refusal of any party to continue negotiations after the State Utilities Commission has started to resolve the disputed issues, shall be considered to be a failure to negotiate in good faith as required by 47 U.S.C. § 251(c)(1).

adequate authority for a finding of preemption under the procedural circumstances on which there is no dispute.

Supra was forced into the new agreement

On August 6, 2002, the FPSC' voted to declare the parties' interconnection agreement null and void on August ih. 2002. This decision was contrary to, among other things, the parties' exclusive arbitration provision contained in the parties' interconnection agreement in effect at that time and in effect at the time Supra filed its Petition for Preemption with the FCC ("Prior Agreement").

On August 6, 2002, Supra filed suit in the Federal District Court for the Northern District of Florida. Case No. 4:02 CV272-RH. This case, among other matters, involves whether the FPSC had the authority to declare the parties Pnor Agreement null and void in contravention of the plain language of the contract which contained an exclusive arbitration clause requiring a panel of arbitrators to decide if, when and how the parties' Prior Agreement would terminate. This suit is still ongoing.

Supra mailed its Petition for Preemption via Federal Express on Thursday, August 15, 2002. The Petition along with exhibits arrived priority overnight at the FCC sometime before 10:30 am. on August 16, 2002. It was not until 4:45 pin, on the afternoon of August 16, 2002, that Supra executed the new interconnection agreement ("Present Agreement"). Supra was forced to execute this new agreement in order to ensure that Supra's approximately 350,000 customers would continue to be provided with local phone service.

If Supra did not execute the new agreement Supra would have been faced with an untenable situation. BellSouth would have then argued that it is prohibited by the FPSC

to provide wholesale services to a CLEC that does not have an approved interconnection agreement. BellSouth would have then moved to disconnect dial tone to Supra's approximately 350,000 customers. To avoid this catastrophe, Supra was forced to execute the new agreement. The new agreement, however. was not executed until after Supra had filed its Petition for Preemption with the FCC

Both FPSC and BellSouth judicially estopped

Both the FPSC and BellSouth argue, rather sheepishly, that this Petition is moot because Supra executed a new agreement. However, this is the exact opposite of what both BellSouth and the FPSC argued to a Federal District Judge in the Northern District of Florida on August 13 2002. [*See* Hearing Transcript for August 13, 2002, for Case No 4 02CV272-RH attached hereto as Reply Exhibit A.]

> THE COURT: "Well, there may some disagreement about that. They [Supra] say they can go to the FCC under 252(c)(5). So, the question is – I don't ask you to agree they have any rights under 252(e)(5); but, if they do, it seems to me [Federal District Judge Robert Hinkle] very unlikely that signing an agreement that you're compelled to sign, based on a decision you disagree with, would constitute a waiver of anything. They say we're going to waive our rights. Tell me your [BellSouth's] position with regard to whether they [Supra] waive any rights at the FCC by signing this agreement."
>
> MR. ENDENFIELD: "Supra does not waive any rights in appropriate forum to hear any argumen1 they have over improper conduct in this arbitration proceeding by the commission. . . ."
>
> THE COURT: "Okay."
>
> MR. EDENFIELD: "They [Supra] have not waived anything by signing the agreement."

Reply Exhibit A, at 35.

> THE COURT: "All right And, I'm going to need the commission [FPSC] to speak to that same issue."

Reply Exhibit A, at 36.

> THE COURT **"All right. And tell me your [FPSC's] position with respect to whether Supra will waive any right to review at the FCC by signing the agreement** that BellSouth has tendered and the commission has approved."
>
> MR. BELLAK: "It seems to me that they [Supra] would have **to** demonstrate some authority for that claim [that Supra would in fact waive its rights under § 252(e)(5)], and we [the FPSC] know of no such authority."
>
> THE COURT: **"*So.* you're not going to go to the FCC and say they've waivcd their position."**
>
> MR BELLAK **"Not at all**

Reply Exhibit A. at 39.

"Judicial estoppel forbids use of intentional **self-contradiction** . . . as a means of obtaining unfair advantage." *See State of New Hampshire v. Stare of Maine*, S32 U.S. 742, 751. 121 S.Ct. 1808. 149 L.Ed. 2d 968 (U.S.2001) *citing Scarano v. Central R. Co.*. 203 F 2d 510, 513 (CA3 1953). "Judicial estoppel protects **prevents** parties from "playing fast and loose with the courts." *Id.* at 750. "Where a party assumes a **certain** position in a legal proceeding, and **succeeds** in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the parry who has **acquiesced** in the position formerly taken by him. *Id.* at 750. in our case, hoth the FPSC and BellSouth **successfully** argued to a **Federal** District Court. rhree (3) days **prior** to **Supra** filing its Petition **for** Preemption with the FCC. that Supra would not waive its rights under § 252(e)(5) if Supra executed the new agreement. Now both of **these** parties **are** strenuously arguing that such a waiver did take place. **The** law precludes both the FPSC and **BellSouth** from making such it claim to rhe FCC

"The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding [FCC - WC Docket No. 02-238] that is inconsistent with a claim taken by that party in a previous proceeding [Federal District Court, Northern District of Florida - 4:02 CV272-RH]." *Id.* at 749

"Court have observed that the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *Id.* at 750. "Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position." *Id.* The above referenced statements by both the FPSC and BellSouth to the Federal District Court demonstrates that this first factor has been satisfied

"Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that ,judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first of second court was misled." *Id.* at 750. In this case, Judge Hinkle did accept the position of both the FPSC and BellSouth. Accordingly, the second factor has been satisfied

> THE COURT: "With respect to Supra's claim that it would waive its right to review in the FCC, **my conclusion, first is that that is not so; that there would not be a waiver. Neither BellSouth nor the Commission has asserted there would be a waiver."**

Reply Exhibit A, at 42 lines 24-25, and 43 lines 1-3.

"A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751. If the FPSC and BellSouth are permitted to now argue that the execution of the new agreement on August 16, 2002, did in fact act as a waiver,

the result both the FPSC and BellSouth would derive an unfair advantage and such would impose an unfair detriment to Supra The FPSC and BellSouth should not now be rewarded for misleading a Federal District Judge.

All of the elements necessary for judicial estoppel are present. Accordingly, the FCC should so find that they are judicially estopped from arguing their new inconsistent position *in* on the law.

FPSC did fail to act

The FCC has already found that "if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request, does preemption become a viable option." *Global Naps, Inc. v. Federal Communications Commission*, 291 F.3d 832, 837 (D.C. Cir. 2002) In our case. the FPSC specifically denied a request for mediation "Under this reading. the purpose of § 252(e)(5) is to hold out the FCC as an *alternative* forum for the adjudication of certain disputes related to interconnection agreements." *Id.* (Italicize in the original). Supra is not asking the FCC to sit as an appellate court in reviewing the substance of a decision on the merits of a particular issue. In this case, the FPSC did not adjudicate the merits of the nine (9) issues raised in Supra's Petition for Preemption Supra recognizes that "the statute does not authorize the Commission [FCC] to sit as an appellate tribunal to review the correctness of state resolution ot such disputes." *Id.* Again. in this instance, the FPSC made no pretense that it would not resolve the dispute between BellSouth and Supra regarding the unresolved issues Accordingly. the Petition for Preemption to *the* FCC was and is appropriate, and preemption is warranted under the facts

The circumstance and conditions under which Supia was required to execute a new interconnection agreement does not in any way create immunity for the FPSC or divest the FCC of jurisdiction over the question regarding whether the FPSC failed to act. The FCC has said as much *See Global Naps, Inc. v. Federal Communications Commission*. 291 F.3d 832, 838 (D.C. Cir. 2002) ("[T]he FCC concluded that the mere issuance of the [state] Commission's final order in each proceeding was insufficient to fulfill the state agency's responsibilities tinder Section 252(e)(5);" Furthermore, the FCC has already "rejected the argument that preemption was inappropriate merely because a state agency had issued a final arbitration order." (citation omitted)). (Underline added for emphasis). Accordingly, any suggestion by the FPSC that the issuance of a final order or the forced execution ot a new agreement divests the FCC ofjurisdiction over the question of whether the FPSC has failed to act is simply incorrect.

The FPSC entered an order on August 22, 2002, approving the new interconnection agreement. The forced entry into this new agreement created a further dilemma for Supra. Under § 252(e)(6) Supra had thirty (30) days in which to seek review of the underlying issues that were in fact part of the evidentiary held before the FPSC. The FCC should note that neither the FPSC nor BellSouth deny nor dispute that the unresolved issues. Supra is seeking relief tor under its Petition for Preemption, were not subject to an evidentiary hearing before the FPSC. On September 23, 2002, Supra was forced to preserve its § 252(e)(6) rights by filing an action in Federal District Court for the Northern District of Florida.

BellSouth now attempts io argue in a Supplemental filed October 3, 2002. with the FCC, that Supra's act to preserve its rights under § 252(e)(6) on issues that were in

not the subject of an evidentiary hearing, somehow divests jurisdiction from the FCC to decide whether the FPSC failed to act on issues that were never the subject *of* an evidentiary hearing before the FPSC, hut nevertheless properly set forth in the parties' petition and response. Under BellSouth's theory, Supra's Petition for Preemprion was a viable option and warranted so long as Supra waived its rights under § 252(e)(6) for issues that were in fact subject to :in evidentiary hearing before the FPSC. BellSouth cannot have it both ways. BellSouth should not be rewarded for its actions.

Supra is a small, minority-owned company trying to compete against this former monopoly. Supra filed this Petition in good-fairh and timely. The elements for preemption have all been met. Supra should not be penalized and denied the right to mediation and if necessary arbitration on issues properly set forth in the parties' petition and response simply because it has chosen to preserve its rights under the Act.

BellSouth agrees

BellSouth points out that if the FCC agrees to preempt in this instance that the preemption should he limited to tlic nine (9) issues described in ¶ 35 *of* Supra's initial Petition for Preemption. *See* BellSouth's Comments Part V pg.28. Supra agrees with BellSouth.

BellSouth spends an inordinate amount *of* time attempting to argue the merits of whether or not the language - included in the interconnection agreement Supra was forced to execute on August IO. 2002 - regarding the ninc (9) issues was language that Supra actually agreed to, *rather* than language Supra was forced to accept.

Supra disputes BellSouth's recitation of circumstances surrounding the ninc (9) unresolved issues. More importantly, though, is that the FCC need not wade into the

matuia regarding thc uiiderlyiiig dispute involving the language in order to determine whether preemption is warranted in this instance. The Only issue for the FCC involves whether the FPSC failed to act in accordance with rules, orders and case law cited herein and in Supra's Petition for Preemption. If the FCC so finds that the FPSC railed to act, then preemption is warranted

BellSouth argues that the FCC should reject preemption because the FPSC staff worked "tirelessly"[4] during the arbitration pi-ocess. The staff's workload, however, is not a relevant issue for consideration in this Petition. BellSouth's claim is analogous to a claim that a police officer's actions in violation of an individual's Fourth Amendment rights are excusable and justified simply hccause the police officer has chosen not to use any annual or sick leave in ihe past 2 years. **Work** effort, while commendable. is not relevant clcnicnt regarding preemption As already noted, the threshold issue for the FCC involves whether the FPSC denied a request for mediation or arbitration by Supra lor issues properly set forth in the parties' pctition and i-esponse, but which was never subject to an evidentiary hearing before that state utilities commission. If the answer to this question is yes, then preemption is warranted.

Derogatory remarks inappropriate

It is unfortunate thai BellSouth would use derogatory language ihroughout its comments. This is simply inappropriate. The language, howcvcr, evidences a contempt that BellSouth holds for its competitors, especially small minority-owncd companies, which attempt to exercise their legal rights. The FCC has already found that an *ILEC.* like BellSouth, possesses superior bargaining power and little incentive to agree to terms

[4] See BellSouth Comments pg. 2.

fail will strip BellSouth of further customers. ¶ 15 First Report and Order. The way in which BellSouth has approached Supra's Petition to the FCC substantiates this finding.

It is also unfortunate that BellSouth would attempt to sully Supra's reputation by making inaccurate statements with respect to legitimate billing disputes that have arisen between the partics over the past two years. The FCC should note that BellSouth fails to inform this Commission that Supra has never refused to pay an undisputed bill. BellSouth also fails to inform this Commission that BellSouth has been found, by a panel of commercial arbitrators ("Tribunal"). to have been wrongfully withholding third-party access revenues in the tens of millions of dollars since June 2001. Furthermore, this same Tribunal has likewise found that BellSouth has repeutedly submitted inaccurate and inflated bills to Supra. With respect to BellSouth's conduct the Tribunal made the following finding

> "**The evidence shows that BellSouth breached the Interconnection Agreement in material ways and did so with the tortuous intent to harm Supra.**"

See June 5, 2001 Award attached hereto as Reply Exhibit B pg. 40.

Finally, BellSouth also fails to inform this Commission that BellSouth was ordered to pi-ovide Supra with direct access to its Operational Support Systems ("OSS") no later than June 5, 2001. The Tribunal wrote the following:

> "The evidence presented shows that Supra must submit local service requests through LENS. an electronic interface supplied by BellSouth. **LENS cannot submit local service orders in real time. A** local service request is processed through several interfaces (including manual introduction) before the local service request can be processed as an order and provisioned (citation omitted). The orders are subject to "edit checks" which generate "clarification requests" which **delay the process even further.** (citation omitted). **LENS does not provide Supra with** the capability to perform pre-ordering, ordering, provisioning, maintenance

and repair and billing **functions in real time or in a manner** consonant with BellSouth's performance of the process." (citation omitted).

"BellSouth witness Pate admitted that Supra could not place orders in ihe same manner as BellSouth. (citation omitted). . . .

"The **evidence** is **overwhelming** that BellSouth has not provided Supra with Operational Support Systems that arc **cqual** to or better than those BellSouth provides itself."

. . .

"Because **BellSouth has failed to meet** its contractual obligations regarding electronic interfaces . . the **Tribunal finds that BellSouth is ohligated to provide Supra nondiscriminatory direct access to BellSouth's OSS and nrders that such access be provided by HellSouth no later than June 15, 2001**."

See June 5, 2001 Award attached hereto as Reply Exhibit B pgs. 21-24,

Supra confirmed this commercial arbitration award in Federal Court. Despite this commercial arbitration award and subsequent Federal Court confirmation, BellSouth – in willful contempt – has refused to comply with this lawful order. As of this writing, BellSouth has still refused io comply. This conduct is the norm Ior BellSouth. BellSouth repeatedly dcmonstrates outright contempt for any lawful order, if that ruling docs not comport with BellSouth's zeal to defeat meaningful competition in contravention of the

Supra simply seeks an even playing field.

FPSC

Some of thc factual assertions madc by the FPSC require correcting. For example, the FPSC stated that "Supra, however, failed to inform the Commission that commercial arbitration was only available 'prior to,' but not 'subsequent to,' a petition filed by either party for state commission arbitration of a follow-on agreement." *See* Page 5 FPSC Comments.

Supra, however, has filed six (6) separate arbitration complaints before the same panel of commercial arbitrators after September 1, 2000. The FPSC's comment is therefore not correct. Furthermore, several of these arbitrations are still ongoing – respective of the fact that Supra was forced to execute a new agreement on August 16, 2002.

The FPSC's comments are also inconsistent with its own orders. On November 28, 2000, the FPSC issued Order No, PSC-00-2250-FOF-TP. In this Order the FPSC granted Supra's Motion to Dismiss on the grounds that BellSouth's claim arose under the parties' present agreement – at that time. The FPSC affirmed and recognized the binding nature of the exclusive arbitration clause. The agreement – at that time – contained an exclusive arbitration clause requiring all disputes to be referred to commercial arbitration for resolution. It is unfortunate that the FPSC's counsel would make such blatant false representations regarding what disputes are required to be taken to commercial arbitration in the FPSC comments. *See* FPSC Comments pg.5. Then again, Mr. Bellak is the same individual who told a Federal District Judge that he would not argue to the FCC that Supra waived its rights under § 252(e)(5) if Supra executed the new agreement on August 16, 2002.

The FPSC suggests in its comments that Supra had an opportunity to submit language and that the FPSC would have chosen either BellSouth's version or Supra's version. However, under the Act, Supra submits that it is entitled to mediation and then arbitration for any issue properly set forth in the parties' petition and response that has not been the subject of an evidentiary hearing. It Supra had submitted language on these

issues that had not gone to hearing. Supra submits it would have waived its rights under § 252(e)(5).

The FPSC's authority to pick and choose language after an evidentiary hearing is narrowly focused on language that implements the FPSC's order with respect to those issues and those issues only, that have been the subject of a full and fair evidentiary hearing. Unlike the FCC, the FPSC does not possess regulations authorizing the state commission to utilize a form of "final offer arbitration" as described in 47 C.F.R 51.807(d). Filing language with the FPSC with respect to the "agreed upon" issues – still of course unresolved - and asking the FPSC to pick and choose language would in effect have relieved BellSouth of its duty to negotiate in good faith,[1] and would have acted as a waiver of Supra's right to avail itself of mediation and if necessary arbitration for those issues which remain unresolved. For these reasons, Supra chose instead to file its present Petition for Preemption with the FCC.

Supra seeks finality

The FPSC suggests disingenuously that Supra seeks to have an endless arbitration process. This is simply not the case. Supra also seeks finality. The FCC is required to render a decision regarding preemption within 90 days from the day Supra filed its Petition. As such, a decision on Supra's Petition will be forthcoming shortly. Supra believes it is important to note once again that the FCC has already concluded that ILECs like BellSouth, posses superior bargaining power and have little incentive to agree to terms that will strip BellSouth of further customers. ¶ 15 First Report and Order. For this reason, every issue is of great importance to Supra. Accordingly, Supra seeks an

[1] Under 47 U.S.C. § 252(b)(5), the refusal of any party to continue negotiations after the State Utilities Commission has started to resolve the disputed issues, shall be considered to be a failure to negotiate in good faith as required by 47 U.S.C. § 251(c)(1).

end to this process, but an end that affords Supra an opportunity to adjudicate all of its issues that were properly set forth in the parties' petition and response

CONCLUSION

For the foregoing reasons, Supra respectfully requests that the FCC preempt the jurisdiction of the FPSC' regarding all remaining unresolved issues between Supra and BellSouth; conduct such proceedings as it deems necessary to determine the merits of the remaining unresolved issues; following such proceedings. issue an order resolving the issues between Supra and BellSouth; and grant such other relief as the FCC may deem just and reasonable

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October 2002, true and correct copies of the foregoing of Supra's Reply Comments, to Supra's Pctition lor Preemption pursuant to Section 252(e)(5) of the Communications Act, including all exhibits and attachments thereto, were served via Federal Express on:

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